JUL 20 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 248

HAMISH SCOTT MACKAY,
Petitioner,

vs.

JOHN P. BOYD, District Director of Immigration and Naturalization, United States Department of Justice, and ROY J. NORENE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Hamish Scott MacKay, respectfully prays that a writ of certiorari issue to review the

judgment of the United States Court of Appeals for the Ninth Circuit entered on February 24, 1955.

CITATION TO OPINIONS BELOW.

The opinions of the District Court for the District of Oregon and of the Court of Appeals are unreported. They, together with the opinion and order of the Immigration and Naturalization Service, are appended hereto as Appendix I, *infra*.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 24, 1955. A petition for rehearing was timely filed and was denied on April 26, 1955. The jurisdiction of this Court is invoked under 28 USC 1254(1). The jurisdiction of the District Court to issue a writ of habeas corpus to review the deportation order was invoked under 5 USC 1009, 28 USC 2201 and 2202, and 28 USC 2241.

QUESTIONS PRESENTED.

Petitioner, a forty-six year old carpenter, lawfully entered the United States from Canada almost twenty-seven years ago. He is married to an American citizen and is the father of American born children, one of whom is presently serving in the United States Army. He has been ordered deported upon

the sole ground of his past membership in the Communist Party.

The questions presented are:

1. Whether the proof of membership is "reliable, substantial and probative" as required by the statute (8 USC 1252[b][4]); and

2. Whether there is proof of anything more than "membership . . . so nominal as to keep [petitioner] out of the deportable class" (*Galvan v. Press*, 347 U.S. 522, 527; cf. *Garcia v. Landon*, 207 F.2d 693 [CA 9], 347 U.S. 1011, 348 U.S. 866).

STATUTES INVOLVED.

8 USC Sections 1251(a)(6)(C) and 1252(b)(4), insofar as relevant here, read as follows:

> §1251(a)(6)(C): "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . . is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> ". . . aliens who are members of or affiliated with (i) the Communist Party of the United States . . ."
>
> * * * * *
>
> §1252(b)(4): ". . . no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

STATEMENT.

Despite his denial of membership in the Communist Party petitioner was ordered deported upon the testimony of four witnesses. The testimony of three of them which was offered to provide a basis for the finding of "membership" consisted only of evidence of petitioner's attendance at Communist Party meetings and of nothing more. None of these witnesses gave testimony that petitioner had ever applied for or been issued a membership book or card in the Communist Party, that petitioner had ever paid dues to the party, that petitioner had ever held any official position in it, or that petitioner had ever admitted such membership. On the contrary, when asked about such matters, these witnesses specifically disclaimed any knowledge of them.[1] Furthermore, the record does not contain reasonable, substantial and probative evidence establishing that the meetings testified to were in fact Communist Party meetings. There is enough in the record to show that the meetings spoken of were not meetings of the Communist Party but of an association of unemployed persons and persons who were on relief rolls during the 1929-33 depression.[2]

The fourth witness and the only one who gave testimony concerning alleged membership books, dues payments and the like was a woman whom petitioner had divorced for intoxication and abandonment of

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[1]Excerpts from the testimony adduced are appended thereto, Appendix II.

[2]See Appendix III.

their minor children years before and whose credibility was shown to be such as to deprive her testimony of the substantiality, reliability and probativeness which the law requires.[3]

In any case, no testimony was offered by this witness or any other which, even if stretched to the utmost, showed anything more than a membership so nominal that as a matter of law petitioner cannot be held to be a member of a deportable class. *Indeed, there was no finding that petitioner's membership was more than nominal.*

The Court of Appeals in a summary *per curiam* opinion held that there was sufficient evidence of the requisite character to sustain the finding below. By a petition for rehearing, this Court's decision in *Galvan v. Press,* 347 U.S. 522, as well as the course of the litigation in *Garcia v. Landon,* 207 F. 2d 693 (C.A. 9), 347 U.S. 1011, 348 U.S. 866, were specifically called to the attention of the Court below and the issue was sharply posed as to whether the record justified a finding of more than "nominal membership". The Court of Appeals denied the petition for rehearing without opinion and without any indication that it had passed upon this issue.

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[3]See Appendix IV.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In holding that there was reliable, substantial and probative evidence that petitioner had been a member of the Communist Party.

2. In refusing to find that if petitioner had been a member of the Communist Party, his membership was so nominal as to exclude him from a deportable class. Indeed, the Court below failed to consider this point at all.

REASONS FOR GRANTING THE WRIT.

1. THE EVIDENCE UPON WHICH THE DEPORTATION ORDER WAS BASED WAS NOT "REASONABLE, SUBSTANTIAL AND PROBATIVE".

The Court below, almost *pro forma* and in a three sentence *per curiam* opinion, has in effect directed that petitioner, an industrious, law-abiding person who has lived in this country for almost thirty years and who has never been arrested for even so much as a traffic violation, be torn from his family and deported. It has directed that he be taken from his American-born wife and children (one of whom, at this very moment, is serving in the United States Army) and returned to a country to which he has been a stranger for almost three decades.

Clearly, while the power to deport may be "plenary", such a result can only be countenanced if there is a showing that there is good reason for committing such a person to exile. This Court has long since

recognized that deportation "may result in a loss of . . . all that makes life worth living" (*Ng Fung Ho v. White,* 259 U.S. 276, 284),[4] and undoubtedly for that reason has held that lawfully admitted resident aliens are entitled to the protections afforded to citizens by the Fifth Amendment's guarantee of due process of law. *Chew v. Colding,* 344 U.S. 590; cf. *Japanese Immigrant Cases,* 189 U.S. 86. It follows as a corollary—and the Courts have recognized it—that the judiciary may examine into the evidence offered to determine whether in fact it supports the order of deportation. *Zakonite v. Wolff,* 226 U.S. 272; cf. *Riley v. Howes,* 24 F.2d 686 (C.A. 1); and *Whitfield v. Hanges,* 222 F. 745 (C.A. 8).

In these cases the burden of proof of the issues is on the Government and not on the respondent (*United States ex rel. Karamian v. Curran,* 16 F.2d 958, 961 (C.A. 2); *Riley v. Howes,* 24 F.2d 686 (C.A. 1)) and evidence which might satisfy that burden in a civil case may well fall short of the standards required for the exercise of so extraordinary and awe-

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[4]Compare:
"Deportation is a process of . . . serious moment" (Brandeis, J., in *United States ex rel. Bilokomsky v. Tod,* 263 U.S. 149).
". . . Although deportation is not technically criminal punishment . . ., it may nevertheless visit as great a hardship as the loss of the right to pursue a vocation or calling . . ." (Douglas, J., in *Bridges v. Wixon,* 326 U.S. 135, 147).
". . . The fate of a human being is at stake" (*ibid.,* at 149).
"Here the liberty of an individual is at stake" (*ibid.,* at 154).
"Although deportation is not technically a criminal proceeding, it visits great hardship on the individual and deprives him of the right to stay and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted" (*ibid.,* at 154).

some a power (cf. *Kwock Jan Fat v. White,* 253 U.S. 454, 464). Responsible commentators have suggested that the rule of reasonable doubt applicable in criminal cases should govern here;[5] and, indeed, in conformity with the criminal rule, the respondent in a deportation proceeding is clothed with a presumption of innocence.

> ". . . where the right to deport is based on the misconduct of the alien subsequent to his entry, the presumption of innocence obtains, and the burden is on the government to establish the fact of guilt."
>
> *Werrman v. Perkins,* 79 F.2d 467, 469 (C.A. 7).

> "It goes without saying that, under the presumption of innocence which exists in his favor and

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[5] "The argument might be made that in expulsion cases a rule of reasonable doubt should be applied similar to that which is said to be applied in criminal trials, and the warrant cancelled if such reasonable doubt exists. There is a striking similarity in fact between the purposes and results of the expulsion process and those of a criminal trial." (Van Vleck, "Administrative Control of Aliens" [1932], p. 206.)

"Whatever the constitutional powers of the government, it ought not to deprive a man of liberty and happiness *without being sure* after a thorough and impartial investigation that the alien actually falls within a proscribed class." (Chafee, "Free Speech in the United States" [1941], p. 199.)

Precedent within the Immigration Service supports the view that this rule should obtain:

"When the accused alien appears to be a person of good general character, fit for American citizenship except for the accusation at hand, and there is reasonable doubt of his membership, the warrant of arrest will be cancelled * * * In cases in which the alien is the father of children born in the United States, and therefore constitutional American citizens, and who are dependent upon and receive from him parental support, every fair doubt regarding membership within the purview of the statute will be accorded." (*In re Thomas Truss,* 66:2 H. Subcom. of Comm. on Immigration and Naturalization, Hearings on Communist and Anarchist Deportation Cases, pp. 9, 17-18.)

> the due process clause of the Constitution, the burden rests on the state or government which in some formal proceeding, criminal or otherwise, undertakes to establish the fact (of deportability)."
>
> *Hughes, Comm'r of Immigration v. Tropello,* 296 F. 306, 309 (C.A. 3).

Thus, even in a deportation case, accusation is not enough. There must be proof. And while in no deportation case has this Court spelled out the quantum of proof required,[6] the Courts of Appeals have adopted the view that the evidence must be measured by a "reasonable doubt" test or, at least, that it must be "substantial" (*Shoeps v. Carmichael,* 177 F.2d 391 [C.A. 9]; *United States v. Hughes,* 104 F.2d 14 [C.A. 3]; *Whitfield v. Hanges,* 222 F. 745 [C.A. 8]; cf. *Ex parte Plastino,* 236 F. 295 [W.D. Wash.]).[7]

The 1952 Immigration Act (8 USC 1252(b)(4)) indicates a legislative acceptance of these criteria, by

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[6]In *Bridges v. Wixon,* 326 U.S. 135, the court was considering a deportation order and concluded, *inter alia,* that it could not be sustained by evidence "too flimsy to support a finding" (at 156).

[7]In *Schneiderman v. United States,* 320 U.S. 118, it was held that in a denaturalization proceeding the Government had the burden of proving the issue by "clear, unequivocal and convincing" evidence which did not leave the issue in doubt. This standard was subsequently applied in *Baumgartner v. United States,* 322 U.S. 665, and remains the standard applicable in denaturalization cases today. Considering that deportation is followed by consequences far more serious than denaturalization, it can hardly be argued that a less rigorous standard is to be applied in a deportation case. In any event the standard to be applied must be sufficiently rigorous to justify an order of permanent exile against a human being who has broken no laws, reared an upright American family, and given his first-born son to the Army of his adopted land.

requiring that the evidence to support a deportation order be "reasonable, substantial and probative." In determining whether the evidence measures up to this statutory requirement, "the whole record" must be considered, not merely isolated portions which in and of themselves might justify the order. Cf. *Universal Camera Corporation v. National Labor Relations Board,* 340 U.S. 474, 487-488.

The charge upon which MacKay has been ordered deported is that he "became a member" of the Communist Party; not that he was sympathetic with the party or affiliated with it or had any relations with it other than those of membership. The question then is whether there was evidence of the requisite quality that MacKay was a "member" of that party. If there was not, then the Court below erred in affirming the judgment against him.

There is very little in the decided cases to assist in determining what is meant by "membership" in an organization. Clearly it imports a formal relationship with mutual rights, duties and obligations. Mere sympathy or casual connection or even "affiliation" is not sufficient.[8]

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[8]In a recent case, the court below approved a District Court's instruction to a jury that "mere association" does not constitute membership, and that,

> ". . . A person may approve some or all of the aims or activities of an organization, yet this does not make him a member. Even sympathy for the program of an organization, or contributions of money do not create the legal status of membership . . . The law also recognizes that active cooperation

The evidence of the Government's witnesses upon which the Court below relied, consists almost exclusively of testimony that in the 1930's, MacKay "attended meetings" which the witnesses, with varying degrees of clarity, called "communist" meetings. MacKay admitted attendance at most of the meetings referred to but testified that they were meetings of the Workers Alliance, an organization active on behalf of the unemployed during the early 1930's. But whether the Government's witnesses or MacKay were correct, the evidence still does not establish the fact of membership, for, as the Court below said when a similar problem was posed to it several years ago,

> "Of course, under the instructions of the court, previously mentioned, Bridges' participation in these activities, taken alone, would fall short of proof of actual Communist Party membership.
> * * *
>
> "It is true that a number of the witnesses described some of these meetings which Bridges attended, and at some of which he presided, as 'closed' Communist meetings. The logical fallacy in concluding from this that Bridges must therefore have been a Party member is that it assumes the truth of that which is sought to be proven. If, in fact, Bridges was not a Party member, his presence at such a meeting would mean no more than that he attended a meeting at

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with an organization in its activities, does not create the legal status of membership . . . Even affiliation, if you should find it to exist in this case, would not constitute the same legal status as membership, for the reason that membership refers to something more than, and different from affiliation." *Bridges v. United States*, 199 F.2d 811, 834 [CA 9].)

which every other person present was a Party member."

Bridges v. United States, 199 F. 2d 811, 836 (C.A. 9).[9]

So, here, MacKay's presence at "meetings" is not reasonable, substantial and probative evidence of "membership".

To the extent that MacKay's ex-wife gave testimony of dues payments to the Party the case stands on no better footing as a matter of law than the one decided by the Court below over twenty years ago in which a deportation order was reversed because of the insufficiency of the evidence to support it despite the fact that a witness "swore" to the critical fact. *Nagle v. Eizaguirre,* 41 F.2d 735 (C.A. 9). In that case the Court said:

> "The only testimony tending to support the charge that the appellee assisted a prostitute, as that term is understood, was the unsupported statement of the prostitute herself. Ex parte Young (D.C.) 211 F. 370. If her testimony is entitled to any credence, of course the order of the court below should be reversed, but we are inclined to agree with the court below that it is not; and this is a matter of law. She admittedly testified falsely and wittingly to material facts on the hearing; she is ignorant and illiterate, as

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[9]Compare the testimony in the case at bar:

"Q. (By Mr. Fenn [Government attorney]) Upon what do you base your knowledge that he was a member of the Communist Party?

A. On several occasions, I think about half a dozen occasions, at the closed meetings that he was present." (Tr. 445.)

her letters disclose; there is a motive back of her testimony; she is as devoid of veracity as of virtue; and has not the slightest regard for the legal or moral sanction of an oath. For these reasons, we are unwilling to sanction the deportation from the country of a man who has been engaged in a gainful occupation for many years, and whose only fault has been his unfortunate association with this degraded woman."

41 F.2d at 736.[10]

Substitute the word "Communist" for the word "prostitute" and you have the case at bar. The record shows that as a matter of law MacKay's ex-wife is not "entitled to any credence" and that she was little more than a common drunk both at the time he procured a divorce from her and obtained the custody of their minor children, and at the time she testified.[11] Certainly under those circumstances, it cannot be said that her testimony is so "reasonable, substantial and probative" as to justify a deportation order.

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[10]A similar result was reached in the earlier case of *Mouratias v. Nagle*, 24 F.2d 799 (CA 9). In that case, in addition the court took into consideration the good character of the respondent.

> "Appellant had lived in the community for fifteen years, and if credence is to be given to the practically undisputed testimony of three witnesses of apparently good standing and numerous testimonials of other witnesses, which the immigration officers received and treated as evidence, he had never before been arrested, and had borne a good reputation as an industrious and law-abiding man." (At 801.)

Attached hereto in Appendix V are summaries from the record containing some of the character testimony offered on behalf of MacKay.

[11]See excerpts from the record on this point contained in Appendix IV.

Indeed, even the ex-wife, like the other witnesses, had to concede that she was not sure of the difference between a Communist Party meeting and a Workers Alliance meeting.

"Q. And these meetings that you attended in which you claim now to be Communist Party meetings were meetings where people got together and discussed how they can get more relief and how they can keep people from being thrown out of their homes for non-payment of rent. Aren't those among the subjects that were discussed? Isn't that so?

A. (No answer.)

Q. That brings back a lot of memories, doesn't it?

A. Yes, it does.

Q. Isn't it true that most of the people discussed in these meetings at your home back in '33 and '34 and '35 was *how to get enough to eat?*

A. Yes.

Q. And *how to pay the rent?* Isn't that so?

A. Yes.

Q. And *how to keep the water from being turned off.* Isn't that so?

A. Yes.

Q. So what you claim were Communist Party meetings might have been meetings of the Workers Alliance where these problems were discussed constantly by the Oregon Workers Alliance. Isn't that true?

A. NO, I DON'T THINK SO.

Q. You never heard anybody at these meetings advocate force and violence, did you? You never heard a single person at these meetings in

your home get up and advocate force and violence. Isn't that so?

A. No, I haven't." (Tr. 770.)

A witness who "doesn't think" that a meeting is a meeting of the Workers Alliance rather than of the Communist Party can hardly be said to give testimony of such substantiality as to require this Court to decree the exile of Hamish MacKay.

It is submitted that as a matter of law the Court below was in error in holding that there was "abundant evidence" to sustain the finding. On the contrary, an examination of all of the evidence in the light of the principles heretofore discussed demonstrates that it is totally insufficient to justify sending a person of the character of Hamish MacKay into exile and tearing him from his American family after he has lived in this country blamelessly for almost three decades.

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2. SINCE THERE IS NO FINDING (NOR WOULD THE EVIDENCE SUPPORT ONE IF IT HAD BEEN MADE) THAT THERE WAS ANYTHING MORE THAN NOMINAL MEMBERSHIP, THE DEPORTATION ORDER IS INVALID.

We will assume, only for this branch of the argument, that there was evidence of the type, character and sufficiency required to support a finding that MacKay was a "member" of the Communist Party. Nonetheless, we urge that the order of deportation cannot stand.

In *Galvan v. Press,* 347 U.S. 522, this Court, in sustaining the deportation order, was very careful to

point out that, despite the literal wording of the statute which makes deportable "a member of . . . the Communist Party", there could be situations in which "membership is so nominal as to keep an alien out of the deportable class". (347 U.S. at 527.) Here was a clear warning that "mere membership", particularly in the distant past, was not sufficient to support so rigorous a penalty as deportation. Indeed, in *Galvan v. Press,* the record established far more than just "membership". According to the opinion there, there was evidence that Galvan "*had been active* (in a Communist Club), and indeed, one of its *officers.*" (347 U.S. at 527.) That is a far cry from the record presented in this case.

That the Government recognized this clear implication of *Galvan v. Press* is seen in its subsequent handling of *Garcia v. Landon,* 207 F.2d 694 (C.A. 9), certiorari granted 347 U.S. 1011, dismissed as moot *on the Government's suggestion,* 348 U.S. 866. In that case the Court below, before this Court's decision in *Galvan v. Press,* had affirmed a deportation order upon a record which showed only that the alien had been a member of the Communist Party for two years. (207 F.2d at 694, n. 3 and 4.) There was no showing in the *Garcia* case—as there is none in the case at bar—that the alien had been "active" in the Party or had been an "officer". Obviously, therefore, this Court's grant of certiorari in the *Garcia* case, just two weeks after it had affirmed—with the "nominal membership" reservation—the *Galvan* deportation or-

der, presented for review the question of whether one situated like Garcia (and also MacKay) was in the "deportable class". In other words, the sufficiency of the showing of mere membership, absent activity or officership, was about to be scrutinized by this Court.

At this juncture of the *Garcia* case—after the petition for certiorari had been granted—the Government filed in this Court a "Memorandum Suggesting that the Cause Is Moot". (No. 118 Oct. Term 1954.) This memorandum was based upon the fact that subsequent to the *Galvan* decision with its "nominal membership" reservation, the Board of Immigration Appeals had granted a *motion of the Immigration Service* to withdraw the order of deportation and to reopen the record for purposes of permitting further proceedings in the light of *Galvan v. Press.* Clearly the Government believed that a finding of mere membership would not, in the view of this Court, sustain a deportation order.

But this is precisely all the Government has here, assuming for this branch of the argument that the evidence supports any finding. For no witness—and this includes MacKay's ex-wife—testified that MacKay was "active" in the Party or an officer of it. *Indeed, the only evidence is to the contrary.* The witnesses never heard MacKay advocate force and violence and "never saw him circulate any kind of literature". (Tr. 20-21.) They disclaimed any knowledge that petitioner was an officer of the

Party,[12] or "active" in its affairs.[13] Nor is there anything in the testimony of the ex-wife which would support a finding of anything more than "mere membership". Indeed, *and this is probably the crux of the matter,* no such finding was (or could have been) made.

The deportation order entered on November 10, 1952 (Tr. 8),[14] long prior to the May 1954 decision in *Galvan v. Press,* is on its face based exclusively upon a finding of "membership" and does not even purport to be based upon any finding of "activity" or "officership". At the time the order was made the Government did not have the benefit of this Court's views in *Galvan* and made no effort to comply with the requirements of that decision.

Thus, MacKay is ordered deported on a record which this Court in *Galvan v. Press,* 347 U.S. 522, warned would not sustain such action and which the Government itself recognized in *Garcia v. Landon,* 207 F.2d 693 (C.A. 9), certiorari granted 347 U.S. 1011, dismissed as moot, 348 U.S. 866, was inadequate.

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[12]"Q. To your knowledge, did Hamish MacKay ever hold any office in the Communist Party?
A. [Witness Knipe] No, not to my knowledge." (Tr. 15.)
• • • •
"Q. Did he [MacKay] hold any office in the [Communist] Party to your knowledge?
A. [Witness Hood] Not to my knowledge." (Tr. 452.)

[13]The witnesses Knipe (Tr. 20-21) and Mahoney (Tr. 89) both spoke of petitioner's "activity"; *but only in relation to the Workers Alliance, not the Party.*

[14]This reference is to the printed record on appeal in this Court; the other references herein and in the appendices are to the typewritten transcript of the proceedings before the Immigration Service filed as part of the record herein.

The reasons which impelled this Court to grant certiorari in *Garcia v. Landon* are all present here. The question which this Court was there about to decide but which the Government voluntarily withdrew from it, is here presented again.[15]

CONCLUSION.

For the foregoing reasons the writ of certiorari should issue.

Dated, San Francisco, California,
July 15, 1955.

Respectfully submitted,
NORMAN LEONARD,
Attorney for Petitioner.

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[15]Indeed, the Government's failure to treat MacKay as it treated Garcia constitutes an unfair and arbitrary discrimination between persons similarly situated and thereby raises a serious implication of a denial of due process which commends itself to this Court's scrutiny.

(Appendices Follow.)

Appendix I

United States Court of Appeals
for the Ninth Circuit

HAMISH SCOTT MACKAY, *Appellant,* vs. JOHN P. BOYD, District Director of Immigration and Naturalization Service, United States Department of Justice, and ROY J. NORENE, *Appellees.*	No. 13,841 Feb. 24, 1955

Before: DENMAN, Chief Judge and CHAMBERS, Circuit Judge and HAMLIN, District Judge

Per Curiam:

MacKay appeals from a judgment in a habeas corpus proceeding, sustaining an order of Immigration and Naturalization Service ordering his deportation and holding him in detention for such deportation, pursuant to 8 U.S.C. 17, because he is an alien who, after entering the United States, became a member of the Communist Party of the United States.

The ground of MacKay's appeal is that the evidence fails to sustain the finding that he is an alien and so became a member of that party. We find

abundant evidence in the testimony of MacKay's wife and other witnesses to sustain the finding.

The judgment is affirmed.

(Endorsed:) Per Curiam Opinion.
Filed Feb. 24, 1955.
Paul O'Brien, Clerk.

[Title of Court and Cause]

JUDGMENT

Appeal from the United States District Court
for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and Entered: February 24, 1955
PAUL P. O'BRIEN, Cerk.

In the United States District Court
for the District of Oregon

Civil No. 6748

HAMISH SCOTT MACKAY,
Petitioner,

vs.

JOHN P. BOYD, District Director of Immigration and Naturalization Service, United States Department of Justice, and ROY J. NORENE,
Respondents.

ORDER.

This matter came on for hearing before the undersigned Judge of the above-entitled Court on December 29, 1952, and upon the petitioner's application for a writ of habeas corpus and a rule to show cause why the respondents should not be restrained from taking any further action pursuant to the Order for the deportation of the petitioner.

The petitioner appeared in person and by his attorneys, Irvin Goodman, Nels Peterson and Sidney Lezak, and the respondents appeared by Henry L. Hess, United States Attorney for the District of Oregon, and Donald W. McEwen, Assistant United States Attorney; and the Court, having examined the record and the evidence adduced before the Hear-

ing Officer, having heard arguments of counsel, and having found that there is substantial evidence to sustain the findings of fact which form the basis for that Order ordering the deportation of the petitioner from the United States, and having further found that the Act of October 16, 1918, as amended by the Act of June 28, 1940, and the Internal Security Act of 1950, under which the petitioner was charged, are constitutional and that there is no merit, either of law or of fact, in other contentions raised by the petitioner; and the Court being fully advised in all the premises; now, therefore, it is hereby

Ordered and adjudged that the petition for a writ of habeas corpus in this cause be and it is hereby dismissed; and it is

Further ordered that the petitioner's bail be and it is hereby revoked.

Dated at Portland, Oregon, this 19 day of February, 1953.

/s/ Gus J. Solomon,
District Judge.

[Endorsed]: Filed Feb. 19, 1953.

United States Department of Justice
Board of Immigration Appeals

File: A-3140686—Seattle (1200-32975)

In re: Hamish Scott MacKay

In Deportation Proceedings

In Behalf of Respondent:

Irvin Goodman, Esquire
1002 Spalding Building
Portland 4, Oregon
and
Nels Peterson, Esquire
413 Equitable Building
Portland, Oregon
and
Mr. Robert B. Bierly (Uncle)
6411 Colesville Road
University Park, Maryland
(Heard: May 12, 1952)

Charges:

Warrant: Act of October 16, 1918, as amended—After entry, alien member of organization that advocates or teaches overthrow by force or violence, of Government of United States.

Lodged: Act of October 16, 1918, as amended—After entry, alien member of organization that distributes, etc., printed matter advocating overthrow, by force or violence, of Government of the United States.

Act of October 16, 1918, as amended—After entry, alien member of section, subsidiary, branch, af-

filiate, or subdivision of organization, registered or requested to be registered under Section 7 of the Subversive Activities Control Act of 1950, to-wit: The International Workers Order.

Act of October 16, 1918, as amended—After entry, alien who was member of the Communist Party of the United States.

Application: Termination of proceedings.

Detention Status: Released on $1000 bond.

The case comes forward on appeal from the decision of the Acting Assistant Commissioner dated January 28, 1952, ordering the respondent deported solely on the lodged charge under the Act of October 16, 1918, as amended, in that he was, after entry, a member of one of the following classes as set forth in Section 1 of the Act: An alien who was a member of the Communist Party of the United States.

The record relates to a native and citizen of Canada, 47 years old, who last entered the United States at the port of Portal, North Dakota, on November 24, 1928, and was lawfully admitted for permanent residence. Although respondent indicated the possibility of some claim to United States citizenship, evidence of respondent's birth in Canada on June 10, 1905, and of his father's naturalization in Canada, prior to the respondent's birth, on February 8, 1905, appear to definitely establish the alienage of the respondent and no evidence has been brought forth to support a claim of citizenship or to refute the finding of alienage.

The facts of the case are fully set forth in the comprehensive and exhaustive decision of the Hearing Officer and in the order of the Acting Assistant Commissioner, the latter of which disposes of exceptions and objections raised by counsel. The respondent has denied membership in the Communist Party of the United States and the question of his membership in the Communist Party raises the principal issue in the case. The evidence submitted by the Government to establish such membership is fully set forth in the decision of the Hearing Officer and no purpose would be served in once again reciting in detail the evidence presented. Most damaging to the respondent is the testimony of his former wife to the effect that during their marriage the respondent had told her that he had joined the Party in 1934 and had recruited her into the Communist Party in 1935; that she had seen and examined his Communist Party book; that the respondent often told her that he was going to attend Communist Party meetings and that they held Communist Party meetings at their home; that she was temporarily secretary of the Albina Branch of the Communist Party; that during the same time her husband, the respondent, was also a member of the same unit; and that she took in dues payments, including those of her husband.

She distinguished the Communist Party from an organization known as the Workers Alliance; testified that both she and her husband attended a school conducted by the Communist Party to teach members the fundamentals of Communism; and identified sev-

eral persons who attended these closed Communist Party meetings. Two of these members whom she had identified as present at closed Party meetings appeared as witnesses for the Government and testified to the respondent's presence at such closed meetings of the Communist Party to which other than Communist Party members were not admitted; and additional corroboration has been furnished by a fourth witness who was actually an undercover man for the Portland Police Department. We conclude that the cumulative and corroborative effect of the testimony of Government witnesses, even with allowance made by attempts to impeach their credibility and veracity, constitutes reliable, substantial and probative evidence sustaining the finding of deportability.

Order: It is ordered that the appeal be and the same is hereby dismissed.

/s/ Thos. G. Finucane
Chairman

Appendix II

Testimony of the witness Knipe:

Q. There was no show of Communist Party membership cards at any of these meetings that you attended. Is that so?

A. That's right. [p. 20][1]

Testimony of the witness Mahoney:

Q. Did Hamish MacKay ever tell you that he was a member of the Communist Party?

A. No. [p. 25]

* * * * * * *

Q. Was there any display of membership books, cards or other means of identification?

A. No.

Q. Was there at any meeting that you ever attended of the Communist Party?

A. It was never displayed.

Q. Was there any showing of cards, membership books, or other means of identification?

A. Not to my knowledge. [p. 83]

[1]The page references are to the transcript of testimony taken before the hearing officer of the Immigration and Naturalization Service, a copy of which was offered and received as an exhibit in the District Court.

Appendix III

Testimony of the witness Knipe:

Q. You don't claim by your testimony, do you, that the Albina Branch of the Communist Party had exclusive use of the Finn Hall?

A. Oh, no, no. [p. 19]

* * * * * * *

Q. You previously testified that is on another occasion, that at these meetings that you designated closed there were people present who you did not know. That's correct, is it not?

A. That's correct.

Q. So whether these people were present who you did not know were members of the Communist Party would be hearsay as far as you are concerned?

A. That's right.

Q. Do you know whether MacKay was active in the Workers Alliance?

A. He was.

Q. Did you ever hear MacKay advocate force and violence?

A. No, I didn't.

Q. He has been a pretty good father to a couple of boys, hasn't he?

A. To the best of my knowledge.

Q. Did you ever see MacKay circulate any literature of any character whatsoever advocating force and violence?

A. No, I never saw him circulate any kind of literature.

Q. When is the last time you saw MacKay prior to this hearing?

A. I believe it was right at the end of that school. I haven't seen him for a—I would say 12 or 13 years. [pp. 20-21]

Testimony of the witness Mahoney:

Q. What was the subject that was discussed at that first meeting in the check room or cloak room at the Finn Hall?

A. Unemployment.

Q. Unemployment. What else?

A. I couldn't remember now.

Q. Could you remember other subjects discussed?

A. No, I couldn't.

Q. Any discussion of politics?

A. That I wouldn't remember. [p. 75]

* * * * * * *

Q. How did you know they were Communist meetings?

A. The same way I would know when I was to a Workers Alliance meeting that I was to a Workers Alliance meeting.

Q. Pardon me?

A. The same way I knew that I was at a Workers Alliance meeting when I was at a Workers Alliance meeting.

Q. How did you know that you were in a Workers Alliance meeting?

A. Well, it is hard to answer. I just knew that I was.

Q. You just knew that you were. Now how many times in you lifetime have you seen Hamish MacKay?

A. I couldn't tell. I wouldn't remember. Maybe four or five times altogether.

Q. Four or five times altogether.

A. Maybe. [p. 84]

* * * * * * *

Q. How many meetings at the Workers Alliance did you see him?

A. I don't know. He was quite active in the Workers Alliance.

Q. How many meetings did you see him at the Workers Alliance?

A. I couldn't definitely say.

Q. Was it once or ten times?

A. It was several times.

Q. More than ten times?

A. It could be.

Q. What is your best recollection?

A. I wouldn't—I can't put a certain number of times down.

Q. How could you tell the difference between Workers Alliance meetings and Communist Party meetings?

A. It was just a difference, that's all.

Q. Just a difference. What was the difference?

A. I can't remember now. I can't even remember the Workers Alliance meetings now.

Q. You can't remember the Workers Alliance meetings now?

A. No, it has been so long.

Q. What was discussed at the Communist Party meetings?

A. Oh, whoever would happen to be running for office and unemployment and welfare and things like that.

Q. What was discussed at the Workers Alliance meetings?

A. Practically the same thing. [pp. 89-90]

Appendix IV

Testimony of the witness Sivertson:

Q. When were you and Mr. MacKay divorced? Do you recall the year?

A. 1944.

Q. Mr. MacKay procured the divorce from you, did he not?

A. Yes.

Q. And the care and custody of the children?

A. Yes.

Q. At the time Mr. MacKay procured the divorce from you, how old were the children?

A. Jimmy was 8 and Ronald was a year and a half, I think. [p. 763]

* * * * * * *

Q. Mrs. Sivertson, have you come here as a witness now and in a matter that is very serious, and we have a duty to interrogate you and ask you questions which we would have preferred to leave out, but you have come here as a witness. As a matter of fact, you had been drinking for quite some period of time before Mr. MacKay divorced you, had you not?

A. Off and on, yes.

Q. How many times before Mr. MacKay divorced you were you arrested in Portland on drunk charges?

A. Just one.

Q. Two times? What happened on the first occasion, do you recall?

A. I refuse to answer that one.

By Hearing Officer. I believe the witness said she had been arrested once.

Mr. Goodman to Witness. Q. Once before the divorce?

A. Yes.

Q. What happened? Were you given a jail sentence, or a fine?

A. I refuse to answer that.

Hearing Officer to Witness. Q. Do you know the answer?

A. Yes.

Q. It is a matter of public record, then. You might as well say.

A. Disorderly conduct and $25 fine.

Mr. Goodman to Witness. Q. Do you recall what year it was that you first began drinking?

A. '39, I guess.

Q. Beg pardon?

A. '39. [p. 764]

* * * * * * *

Q. Mrs. MacKay, I have procured during the noon hour with the consent of the Circuit Court the official file which Mr. Fenn and the Hearing Officer are perfectly free to examine, but which I must return to the Clerk of the Circuit Court. It is case No. 158802, the Circuit Court of Multnomah County, State of Oregon, wherein Hamish MacKay was the plaintiff and Sylvia MacKay was the defendant. I am going to show you this file and ask you to state if you are the person who is the defendant in this case. This file mentions that there are two children, James and Ronald MacKay. Those are the children, are they not?

A. Yes.

Q. You were the Sylvia MacKay who was sued for divorce by Hamish Scott MacKay in November, 1944, were you not?

A. (Shakes head affirmatively.)

Q. Will you answer for the record?

A. Yes.

Q. At that time Ronald was about 18 months old and James MacKay was about nine years old. You are the mother of those children. Isn't that so?

A. Yes.

Q. And about that time you wrote a note to your husband telling him in part as follows, did you not? "Mac, I am leaving you for good. Now I want to see the boys, every week. I know you won't let me have them because of my drinking." Did you write such a note to your husband?

A. I don't remember now.

Q. You don't recall that? It is a fact, is it not, that His Honor Judge Fred Bronn, Judge pro-tempo of the Circuit Court, Multnomah County, State of Oregon, granted a decree of divorce to Hamish MacKay, your former husband, on December 6, 1944, and granted to Hamish MacKay the care, custody, and control of the children? That is a fact, is it not?

A. Yes.

Q. After you married Mr. Sivertson you were arrested in Portland upon a charge of drunk and confined in jail. Isn't that so?

A. Yes.

Q. How many days did you do in jail on that occasion, Mrs. Sivertson?

A. Second time I was arrested I was arguing on the street with Mr. MacKay, and——

Q. But you were arrested on a drunk charge while you were married to Mr. Sivertson here in Portland, Oregon, were you not?

A. Yes, it was at that time.

Q. How much time did you do in jail on that occasion. Weren't you sent $20 by your present husband?

A. He sent me $25.

Q. Why did he send you the $25?

A. To pay a fine, but I paid only $8 of it because they put me on as a trusty. I was there from Wednesday to Sunday.

Q. In Portland, Oregon, on a drunk charge as the wife of Sivertson. Is that so?

A. Yes.

By Hearing Officer. When was this?

Mr. Goodman to Witness. Q. What year was that?

A. I can't recall. It was '48, I guess.

Q. Have you been arrested on a drunk charge since 1948 either here or in any place else?

A. In Portland here when I came to visit the children.

Q. And what happened on that occasion?

A. I was singing in a tavern.

Q. And did you get a fine or jail sentence?

A. Fine.

Q. Just roughly speaking, can you estimate the number of times that you have been arrested for drunk in your lifetime? Just approximately.

A. I don't know. Do I have to answer that question?

Hearing Officer to Witness. Answer it to the best of your knowledge.

By Witness. About 7 or 8 times, I think.

Mr. Goodman to Witness. Q. 7 or 8. That's just an estimate. You understand that?

A. Yes. [pp. 765-767]

* * * * * * *

Q. How long have you been living in Burley, Idaho?

A. About—it was a year ago last August that we, first of August that we got this job.

Q. You mean your husband?

A. Yes.

Q. And have you ever been arrested for being drunk in Burley, Idaho?

A. Yes, once.

Q. How long ago was that?

A. Oh, it was quite a while ago.

Q. How long ago would you say?

A. A year ago last June.

Q. *Now is that the last time that you have been drunk?*

A. *Last time I was arrested was here in Portland when I came to visit my children.*

Q. *When was that?*

A. *In December.*

Q. *December of last year?*

A. *Yes.* [p. 777]

Appendix V

TESTIMONY AS TO MacKAY'S GOOD CHARACTER.

James C. Roberts, a Texas born dairy farmer, has known MacKay since 1933. He vouches for MacKay's integrity and truthfulness and states that MacKay has never circulated any literature that advocated the overthrow of the Government by force or violence (Tr. 543-553).

Dorothy MacKay, the American born sister-in-law of MacKay, is Vice-President of an auxiliary post of the American Legion of which her husband (MacKay's brother) is a past commander. She knows MacKay well and has never heard him utter a word against the Government. She regards MacKay as a person of honesty and integrity and knows that he has a good reputation for these traits of character in the community. She believes that he is a fit person to become an American citizen (Tr. 554-559).

Virgil Roberts, and his wife, *Leveta,* both Texas born members of the A. F. of L. Furniture Workers Union and an American Legion post in Portland, have known MacKay since 1934 and neither of them has ever heard MacKay "talk Communism" or has ever known him to circulate any literature of any kind. They know that MacKay has a good reputation for honesty and truthfulness and in their opinion MacKay is a law-abiding person entitled to be an American citizen (Tr. 560-571).

Mildred Kolmayer, a member of the Oregon Grange and the Lutheran Church, has known MacKay since

1946. He has a good reputation for honesty and integrity. She has never heard him advocate the overthrow of the Government by force and violence. She has never seen him circulate any literature. She believes that he would make a good American citizen (Tr. 571-580).

William F. Holtz, a Missouri born American citizen, is a farmer who has known MacKay since 1933 and is a former employer of MacKay. He never heard MacKay speak against the Government, or never saw him circulate literature. McKay has a good reputation for truth and veracity. He believes that MacKay would be a good American citizen (Tr. 581-584).

Clarence J. LaSalle, a Minnesota born carpenter, is a Purple Heart Veteran of World War I. He is opposed to Communism. He has known MacKay since 1929. He served as a sergeant in the National Guard Unit in which MacKay was a private, under his command. He believes that MacKay's reputation for truthfulness and honesty in the community is excellent. MacKay never advocated the overthrow of the Government by force and violence. He believes MacKay would be a good American citizen (Tr. 585-595).

Rosa V. McClure, an American citizen, is a member of the Oregon State Grange. She has known MacKay since 1943. They were both active in the Cub Scouts of America. MacKay is a law-abiding person with a reputation of being honest and truthful (Tr. 720-724).

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 248

HAMISH SCOTT MACKAY, PETITIONER

v.

JOHN P. BOYD, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, UNITED STATES DEPARTMENT OF JUSTICE, AND ROY J. NORENE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. App. i-ii) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1955 (R. 34). A petition for rehearing was denied on April 26, 1955 (R. 35). The petition for a writ of certiorari was filed on

July 20, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence of petitioner's membership in the Communist Party was sufficient to support a finding that he was deportable on this ground.

STATUTE INVOLVED

Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006, 8 U.S.C. (1946 ed. Supp V) 137, *et. seq.*, amended the Act of October 16, 1918, 40 Stat. 1012, to provide, in pertinent part, as follows:

> [Sec. 1.] That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any one of the following classes:
>
> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, * * *;
>
> * * * * *
>
> Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1

(2) ofthis Act, shall, upon the warrant of the Attorney General, be taken into custody and deported * * *. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

STATEMENT

Petitioner is a Canadian citizen who has resided in the United States since 1928. In December, 1952, he filed a petition for habeas corpus, in the United States District Court for the District of Oregon, to review the legality of a deportation order, under which he had been taken into custody (R. 3-11). Petitioner's attack on the order was based, *inter alia,* on his claim that there was insufficient evidence to sustain the finding of the Immigration Service that he had been a member of the Communist Party from 1936 to 1941, on which ground he has been ordered deported. The District Court, following a hearing, found the evidence sufficient and dismissed the petition (R. 19). The Court of Appeals unanimously affirmed (R. 33).

A. *The Deportation Proceedings*

On August 10, 1949, deportation proceedings were begun against petitioner, on the ground that he was deportable as having been an alien member of an organization advocating the overthrow of the Government by force or violence (R. 5; Pet. App. v). Subsequently, under Section 22 of the Internal Security Act of 1950, *supra,* pp. 2-3, an addi-

tional charge was lodged against him, on the ground that he was deportable as an alien who had been a member of the Communist Party after entry into the United States.

At the deportation hearings, the Government's evidence included the testimony of four witnesses who were ex-members of the same branch of the Communist Party to which petitioner was alleged to have belonged. Each of these witnesses was interrogated extensively, both on direct and cross-examination, and each testified that they knew petitioner as a Communist and had attended Communist meetings with him (Tr. 13-21, 22-27, 440-445, 748-781).[1]

One of these witnesses was Robert McClure Hood, who testified that he had joined the Communist Party in 1940 at the request of the Portland police department, for the sole purpose of furnishing the police with information regarding Communist activities, to whom he subsequently made regular reports on the activities of the Communist Party (Tr. 442, 443). He belonged to the Albina Branch of the party (Tr. 443) and recalled attending approximately six closed meetings at which petitioner was present (Tr. 445). He testified that petitioner was usually accompanied by his wife, Sylvia (Tr. 452), that the meetings consisted

[1] Exhibit No. 1, filed in this Court as part of the certified record, is the complete record in the proceedings before the Immigration and Naturalization Service. It is not paginated and so no page references are given. However, the transcript of the hearings, which is part of the immigration file, is paginated and will be referred to throughout this brief as "Tr.".

of from three to ten people, and that he knew most of them (Tr. 452, 446).

A second witness was Lee A. Knipe, who testified that he had been a Communist from 1937 till 1940 and that he had met petitioner with his wife at the first party meeting he had attended (Tr. 14). In all he recalled approximately ten closed meetings he attended at which petitioner was present (Tr. 15, 18). He stated that only Communists attended these meetings and that they all knew each other (Tr. 15, 18). Knipe, who had been Educational Director of the Albina Branch of the Communist Party (Tr. 15), was present with petitioner at a party meeting when the executive board selected both of them to attend a Communist school (Tr. 16).

A third witness was Irene Mahoney, the former wife of Lee Knipe. She testified that she had been a Communist from 1938 to 1940 (Tr. 22), belonged to the Albina Branch (Tr. 23), had attended four or five closed Communist meetings with petitioner (Tr. 24), and that petitioner and his wife had been in her home (Tr. 24). She had also been a member of the Worker's Alliance (Tr. 47) and distinguished its meetings from the Communist Party meetings she attended (Tr. 24, 25, 89).

The witness who testified in most detail as to petitioner's activity as a Communist was Sylvia N. Sivertson, petitioner's former wife. She had been contacted by Immigration officials only two days before her appearance at the hearing (Tr. 749). She testified under subpoena (Tr. 749) and ex-

pressed reluctance to testify against her former husband because of their children (Tr. 750). Her testimony included the following (Tr. 750-752):

Q. Were you ever a member of the Communist Party?

A. Yes.

Q. Will you state when you joined the Communist Party?

A. I believe it was in the latter part of 1935.

Q. To your knowledge was your husband at that time, the respondent Hamish MacKay, a member of the Communist Party?

A. Yes.

Q. Do you know when he joined the Communist Party?

A. I believe it was two months after we were married.

* * * * *

Q. How long after he joined did you join the Communist Party?

A. I believe it was about the latter part of 1935.

Q. Who suggested or asked you to join the Communist Party?

A. My husband did.

Q. That is the respondent, Hamish MacKay?

A. Mr. MacKay.

Q. Did you execute an application card to join the Communist Party. Did you fill out a card?

A. Yes.

Q. Were you after joining issued a Communist Party membership book or card?

A. Yes.

* * * * *

Q. Did you see the membership book or card belonging to the respondent, Hamish MacKay?

A. Yes.

Q. Where did you see it?

A. At home.

Q. Did you ever have it in your hands or have it in your custody; that is, where you could look at it and examine it?

A. Yes, I looked at it and examined it.

Q. After you joined the Communist Party did your husband take you to Communist Party meetings or did you go with him to Communist Party meetings?

A. Yes, I went with him.

Q. Where did you attend these meetings with him, as you recall?

A. Usually at friends' homes. Sometimes at our home.

Q. Did all the persons who attended the meetings in your home belong to the Communist Party, to your knowledge?

A. To my knowledge, yes.

Q. Do you remember who any of these persons were?

A. Not right offhand.

Q. Did you pay dues into the Communist Party?

A. Yes.

Q. Did you ever hold any office in the Communist Party?

A. I was secretary at one time for Albina Branch, Unit 4.

Q. Was the respondent, Hamish MacKay, also a member of that unit and that branch?

A. Yes.

Q. What were your duties as secretary?

A. Write the minutes of the meeting and take in dues payments.

Q. Did you collect dues from the respondent, Hamish MacKay?

A. Yes.

Q. Did you issue receipts when you collected dues?

A. Yes.

Q. And did you issue receipts to him for payment of those dues?

A. I am sure I did for him, yes.

This witness also testified: She had attended meetings with petitioner at which two of the other witnesses, Lee A. Knipe and Irene Knipe Mahoney, were often present (Tr. 753). Petitioner sometimes presided over the Communist Party meetings (Tr. 760). The last Communist Party meeting she could recall at their home was in 1939 (Tr. 756). Petitioner was an active member of the party. They quarrelled over his attendance at so many meetings and his generosity to the party (Tr. 752, 763). One particular quarrel she recalled was over her refusal to give half her first pay-check

to the Communist Party (Tr. 754). She specifically recalled the night she returned from the hospital with their first child when petitioner stayed up till 3 a. m. cutting a stencil which said "Join the Communist Party" (Tr. 752). Petitioner was supposed to go out after 3 a. m. and copy the stencil onto sidewalks (Tr. 752). She saw such stenciled exhortations on the sidewalks thereafter (Tr. 753). Her husband talked about the Communist Party a great deal at the time, both to herself and to others in her hearing (Tr. 753). He distributed pamphlets with the words "Join the Communist Party" stamped across the bottom (Tr. 759), and solicited memberships in the party (Tr. 758). She and petitioner attended a Communist school (Tr. 757). They both were also members of the Workers Alliance (Tr. 755), which she distinguished from the party (Tr. 755, 770). She dropped out of the party in 1943 (Tr. 754) and was divorced from petitioner in 1944 (Tr. 749).

Petitioner, in his defense, offered the testimony of numerous character witnesses, and attacked his former wife's credibility largely on the ground that she had been an alcoholic with a record of arrests for drunkenness. He also took the stand in his own behalf and denied having ever been a Communist or having attended any meetings of the Communist Party (Tr. 658, 659, 697, 794, 796). He admitted knowing the government witnesses (Tr. 660, 677, 679), and, on cross-examination, he also admitted that he had taken the Daily Worker for a year, although he said someone else had sent in

his subscription (Tr. 700). He further admitted to having referred to two Oregon newspapers as the "Capitalistic Press" (Tr. 771). His character witnesses testified that they did not know petitioner as a Communist and that he had a good reputation in the community (Tr. 523-603, 720-728).

On the basis of the testimony adduced before him, the Hearing Officer found, *inter alia,* that petitioner had been a "member of the Communist Party of the United States at least from early in 1936 to September of 1941" (R. 14). Thereafter, the Acting Assistant Commissioner of Immigration ordered petitioner's deportation under the lodged charge involving Communist Party membership (see Pet. App. vi; and Exhibit No. 1, filed in this Court). Petitioner then appealed to the Board of Immigration Appeals, which sustained the deportation order (Pet. App. v-viii), stating (Pet. App. viii):

> We conclude that the cumulative and corroborative effect of the testimony of Government witnesses, even with allowance made by attempts to impeach their credibility and veracity, constitutes reliable, substantial and probative evidence sustaining the finding of deportability.

B. *The Habeas Corpus Proceedings*

After he had been taken into custody for deportation, petitioner sought his release by petitioning the District Court for a writ of habeas corpus, claiming that the deportation order was invalid (R.

3-11). While he advanced various reasons for upsetting the deportation order, only one is material to the issues raised in the petition for certiorari—namely, that the evidence was unsubstantial and insufficient to sustain the finding that he had been a Communist Party member. A hearing was held, and the court reviewed the record in the deportation proceeding (Exhibit 1), including the evidence adduced before the Hearing Officer (see R. 18). The court found that the evidence was sufficient to sustain the challenged findings of fact, that there was no merit to any of petitioner's contentions and entered an order dismissing the habeas corpus petition (R. 18-19).

The Court of Appeals unanimously affirmed, *per curiam,* stating: "We find abundant evidence in the testimony of [petitioner's] wife and other witnesses to sustain the finding" (R. 33).

ARGUMENT

The issue which petitioner raises is factual and depends entirely on the credibility of the witnesses who personally appeared before the Hearing Officer in the deportation proceeding. There is ample and compelling evidence to support the finding that petitioner had been a member of the Communist Party, under the "reasonable, substantial, and probative" requirements set forth by Congress, in the Immigration and Nationality Act of 1952, 66 Stat. 163, 208, 8 U.S.C. 1252(b)(4), as the criteria for evidence in deportation proceedings. The factual determination of the Hearing Officer has al-

ready been reviewed and unanimously sustained by (1) the Acting Assistant Commissioner (see Pet. App. vi); (2) the Board of Immigration Appeals (Pet. App. v-viii); (3) the District Court (R. 18-19); and (4) the Court of Appeals (R. 33). There is clearly no occasion for further review by this Court.

The testimony of his former wife, given reluctantly under subpoena (Tr. 749, 750), established that petitioner had joined the Communist Party (Tr. 750), paid dues (Tr. 752), received a membership book (Tr. 751), solicited memberships (Tr. 751, 753), and had been schooled in (Tr. 757) and worked for the Communist cause (Tr. 752, 759). Her testimony was corroborated by three other witnesses, all of whom testified that they had been members of the same branch of the Communist Party as petitioner and his former wife and had attended meetings of the party with them (Tr. 13-21, 22-89, 440-496). Such a course of conduct denotes "membership" in an organization under the narrowest of definitions.

Petitioner urges this Court to overturn the findings of the Hearing Officer and the Acting Assistant Commissioner of Immigration, and the decisions of the Board of Immigration Appeals, the District Court and the Court of Appeals on the grounds that his former wife was not a credible witness because she had been arrested for drunkenness on occasion (Pet. 12, 13). This Court has consistently refused to assume the task of judging the

credibility of witnesses appearing before administrative tribunals. *Warehouse Co.* v. *United States,* 283 U.S. 501, 508; *Medo Corp.* v. *Labor Board,* 321 U.S. 678, 681-682. Furthermore, one who has been arrested on occasion for drunkenness does not automatically lose all credibility as a witness. The fact that her testimony was substantiated in large measure by that of three other witnesses more than justified any reliance placed upon it by the tribunals below.[2]

Petitioner's defense to the government's case against him consisted of his self-serving statements that he had never been a Communist or affiliated with the party (Tr. 658, 659, 794, 796, 697), various testimonials of neighbors, friends, and relatives (Tr. 523-603, 720-728), and an attempt to establish that the meetings he attended with the witnesses were those of the Worker's Alliance and not the Communist Party (Tr. 660, 677-679).

The government's witnesses, however, stated that they knew the difference between the two types of meetings. They distinguished the Communist meetings as being small and held in one building, while the Worker's Alliance meetings drew larger numbers of people and were held in a different building (Tr. 755, 770, 24, 25, 89, 476). As for the character witnesses who appeared in petitioner's behalf, they

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[2] It should be noted that in the case of *Nagle* v. *Eizaguirre,* 41 F. 2d 735 (C.A. 9), cited by petitioner (Pet. 12), the testimony of the witness was discredited because it was unsupported and "she admittedly testified falsely and wittingly to material facts on the hearing * * *", 41 F. 2d 735, 736.

were all people from whom petitioner may well have concealed his Communist Party activities.

Petitioner's long membership and active participation in the Communist Party, as established by the testimony in this record, was far more than the nominal one which this Court indicated in *Galvan* v. *Press*, 347 U.S. 522, 527, might not be a basis for deportation.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1955.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 248

HAMISH SCOTT MACKAY,
Petitioner,

vs.

JOHN P. BOYD, District Director of Immigration and Naturalization, United States Department of Justice, and ROY J. NORENE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ANSWER TO OPPOSITION TO PETITION FOR CERTIORARI.

The government's opposition seeks to obscure the fact that no finding was (or could have been) made to the effect that there was anything more than

ancient nominal membership in the Communist party. And while the government notes (Opposition, p. 14) petitioner's reference to this Court's reservation in *Galvan v. Press,* 347 U.S. 522, that there may well be situations in which membership is "so nominal as to keep an alien out of the deportable class" (347 U.S. at 527), it totally fails to consider the course of the litigation in *Garcia v. Landon,* 207 F. 2d 694 (CA 9), certiorari granted 347 U.S. 1011, dismissed as moot on the government's suggestion, 348 U.S. 886. No effort whatever is made to justify the treatment accorded to petitioner here as compared with what was done in the *Garcia* case. Indeed, for reasons already pointed out in the petition (pp. 17-18), such disparity of treatment cannot be justified.

Perhaps this is why the government spends the bulk of its opposition arguing an abstract proposition that is really not in this case, i.e., that this Court should not pass upon the credibility of witnesses appearing before administrative tribunals (Opposition, pp. 11-13). The petition does not call upon this Court to overturn implied[1] credibility findings.

This Court is asked to say only whether the statutory mandate that "no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence" (8 U.S.C. 1252 [b][4]) has been complied with. The meaning of this language and its application to the facts of any given case have never, so far as we know, been the subject

[1]It should be noted that there were no express findings as to credibility.

of decision by this Court. Clearly, the determination of whether evidence measures up to a specific statutory standard raises a question of sufficient importance in the administration of the underlying statute as to justify review by this Court. Cf. *United States v. Ruzicka,* 329 U.S. 287, 288; *Maneja v. Waialua Agricultural Co.,* 349 U.S. 254. Indeed, in deportation cases this Court has never hesitated to examine the evidence to see if it supports the order. *Zakonite v. Wolff,* 226 U.S. 272; *United States ex rel. Bilokumsky v. Tod,* 263 U.S. 149; *Bridges v. Wixon,* 326 U.S. 135. In *United States ex rel. Brzovich v. Holton,* 222 F. 2d 840 (CA 7), the Court of Appeals just recently rejected testimony similar to that presented here and also given by a professional ex-Communist informer, as having "no more probative value than the tattlings from a town meeting" (at 844).

The government's reliance (Opposition, p. 13) upon cases arising under statutes dealing with orders of the Interstate Commerce Commission (*Merchants Warehouse Co. v. United States,* 283 U.S. 501) and the National Labor Relations Board (*Medo Photo Supply Corp. v. National Labor Relations Board,* 321 U.S. 678) is quite misplaced since those cases involved not the permanent exiling of a person who had long been a lawful resident of the United States, but rights of quite a different character, and since those cases arose under statutes which did not contain the "reasonable, substantial and probative" evidence requirements present in the case at bar. Cf. *Stark v. Wickard,* 321 U.S. 288, 312.

But as we have said above, the chief feature of the government's response is its failure to meet our second point—the challenge posed by this Court's decision in *Galvan* and its total ignoring of *Garcia*. The *Galvan* decision came down *after* the order in this case was entered and clearly, therefore, that order was made at a time when the Immigration Service was of the view that a person was deportable for "nominal" membership alone; no other finding was made here. Yet while it was willing to re-examine the record in *Garcia* in the light of *Galvan*, it apparently is not willing to do so here. This anomalous treatment of petitioner is nowhere justified or even explained by the government.

The avoidance by the government of the issues raised by the petition does not detract from their significance. On the contrary, it suggests the necessity of this Court's reviewing this case so that questions important to the administration of the deportation statutes may be resolved here for the guidance of both aliens and the government.

Dated, San Francisco, California,
September 14, 1955.

Respectfully submitted,
NORMAN LEONARD,
Counsel for Petitioner.

MOTION FILED APR 24 1956

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 248

HAMISH SCOTT MACKAY,
Petitioner,

vs.

JOHN P. BOYD, District Director of Immigration and Naturalization, United States Department of Justice, and ROY J. NORENE,
Respondents.

MOTION FOR LEAVE TO FILE
PETITION FOR A REHEARING
and
PETITION FOR A REHEARING OF ORDER DENYING
PETITION FOR CERTIORARI.

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In the Supreme Court
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OCTOBER TERM, 1955

No. 248

HAMISH SCOTT MACKAY,
Petitioner,

vs.

JOHN P. BOYD, District Director of Immigration and Naturalization, United States Department of Justice, and ROY J. NORENE,
Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR A REHEARING.

Petitioner, Hamish Scott MacKay, respectfully moves for leave to file the annexed Petition for Rehearing of the order of this Court denying the Petition for Certiorari in this case, entered on October 10, 1955. Rehearing is sought at this time because this

Court on March 26, 1956, granted a Petition for Writ of Certiorari in the case of *Rowoldt v. Perfetto,* No. 676, Oct. Term, 1955. The *Rowoldt* case presents issues which are indistinguishable from those presented by the petition in this case, as is more fully pointed out in the annexed petition.

Although this Petition for Rehearing is filed after the expiration of the time prescribed in Rule 58, the grounds upon which it is based arose after such time, and this Court clearly has the power, in its discretion, to entertain this petition. *Pickett v. Union Terminal Co.,* 313 U.S. 591, 314 U.S. 704, 315 U.S. 386, 394; *Bowden v. City of Fort Smith,* 314 U.S. 651, 315 U.S. 793, 316 U.S. 584, 586; *Helvering v. Sprouse,* 316 U.S. 656, 318 U.S. 604; *Zap v. United States,* 328 U.S. 624, 330 U.S. 800; *Silesian-American Corp. v. Clark,* 332 U.S. 469, 474; *Bradley Mining Co. v. Boice,* 345 U.S. 932.

Dated, San Francisco, California,
April, 1956.

Respectfully submitted,
NORMAN LEONARD,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 248

HAMISH SCOTT MACKAY,
Petitioner,

vs.

JOHN P. BOYD, District Director of Immigration and Naturalization, United States Department of Justice, and ROY J. NORENE,
Respondents.

PETITION FOR A REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

Petitioner, Hamish Scott MacKay, prays that this Court grant rehearing of its order of October 10, 1955, denying the Petition for Writ of Certiorari, 350 U.S. 840, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case as prayed for in the petition filed herein on July 20, 1955.

REASONS FOR GRANTING A REHEARING AND ISSUING THE WRIT.

Both in the instant case and in *Rowoldt v. Perfetto*, No. 676 October Term, 1955, certiorari granted March 26, 1956, Courts of Appeal affirmed orders dismissing petitions for writs of habeas corpus which had been brought by aliens challenging the validity of deportation orders. In each case the deportation order was sought upon the basis of the alien's alleged past membership in the Communist Party, pursuant to the provisions of Sec. 241(a)(6)(C) of the Immigration and Nationality Act of 1952, 8 U.S. Code § 1251(a)(6)(C). In each case there were findings that the alien had legally entered the United States many years ago[1] and, for a brief time in the 1930's had been a member of both the Workers Alliance and the Communist Party.[2] In each case deportation was ordered solely because of the long since past membership in the Party.

The Petition for Writ of Certiorari in the instant case urged, first, that there was no reliable, substantial or probative evidence to establish that petitioner had ever been a member of the Communist Party, *and second, that in any case petitioner was not shown to have been more than a "nominal" member as that term is defined in Galvan v. Press, 347 U.S. 522.* (Petition, pp. 5 and 15-18, and Answer to Opposition, pp. 2 and 4.) The petition in the Rowoldt case raises substantially

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[1]Rowoldt, last, in 1923 or 1924; MacKay, last, in 1928.

[2]In the instant case the witnesses sometimes could not distinguish between the two (see Petition for Certiorari, page 14; Appendix pp. xi to xii).

the same issues although it phrases them somewhat differently.[3]

In each case petitioner adverted to the course of the litigation in *Garcia v. Landon,* 207 Fed. 2d 693, 9 Cir., 347 U.S. 1011, 348 U.S. 886, and urged that the Government's handling of that case required the granting of the petition (*MacKay* petition, pp. 16-19; *Rowoldt* petition, pp. 6-8).

In each case, the Government filed an opposition to the petition and in both cases it took substantially the same position, asserting that the issues presented had been foreclosed by this Court's decision in *Galvan v. Press* (Opposition in *MacKay,* p. 14; Opposition in *Rowoldt,* pp. 6, 8).

The same reasons which impelled this Court to grant the petition in the *Rowoldt* case are present here and justify its granting this Petition for Rehearing and issuing a writ to review the judgment of the Court of Appeals for the Ninth Circuit.

When the instant petition was filed last July and denied last October, there were, so far as counsel, and presumably this Court, knew, no other cases pending in the lower courts presenting the questions now under consideration. It appears, however, from the *Rowoldt* petition (pp. 8-9) that there are now, and apparently were then, other cases pending involving such questions. This Court's ultimate decision in

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[3]Rowoldt's petition presents the question of whether petitioner had been a member of the Communist Party as that term was defined in *Galvan v. Press,* or had merely been a nominal member and was therefore not deportable, and whether the statute was unconstitutionally applied to the facts of Rowoldt's case. This, we submit, is saying substantially what we said in the MacKay petition but in different language.

Rowoldt will resolve these questions, and the aliens in those cases will have the benefit of this Court's rulings. However, unless this Court grants this Petition for Rehearing and issues the writ here, MacKay will be deprived of the benefits of whatever rulings may eventuate, since, as to him, the order of deportation will have become final.[4]

Having granted the petition in the *Rowoldt* case, it is respectfully submitted that it would be arbitrary and capricious to permit to stand, without review, the adverse decision of the Court of Appeals for the Ninth Circuit in the instant case. No distinction appears between the two cases, and since this Court is going to review one, it should review the other.

CONCLUSION.

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
April, 1956.

Respectfully submitted,
NORMAN LEONARD,
Counsel for Petitioner.

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[4]At the present to me MacKay is seeking the *discretionary* relief of suspension of deportation pursuant to Section 244(a)(5) and 244(c) of the Immigration and Nationality Act of 1952; 8 U. S. Code 1254(a)(5) and 1254(c). Such relief, however, is quite a different thing from a finding that he is not deportable.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

NORMAN LEONARD,
Attorney for Petitioner.